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SUPREME COURT, U. S.

No. 1066

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IN THE

Supreme Court of the United States

October Term, 1966

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL., *Petitioners,*

v.

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 15, 1967

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QUESTIONS PRESENTED

1. Whether Section 13a(1) of the Transportation Act of 1958 is constitutional insofar as it authorizes an interstate railroad to discontinue an interstate train and thereby to discontinue intrastate service provided by the train without providing for a hearing before

and findings by the Interstate Commerce Commission on the question whether the intrastate service burdens interstate commerce.

2. Whether the court below erred in holding that neither the full faith and credit clause of the Constitution nor the doctrine of comity required the District Court to dismiss a suit brought by The Pennsylvania Railroad Company to enjoin enforcement of an order of the Public Utility Commission of Pennsylvania that required the railroad to restore service discontinued in conformity with the provisions of Section 13a(1) of the Transportation Act of 1958.

STATUTE INVOLVED

The text of Section 13a(1) of the Transportation Act of 1958 (49 U.S.C. § 13a(1)) appears in the Appendix to this brief.

STATEMENT

Five years ago The Pennsylvania Railroad Company ("the Railroad"), after full compliance with the provisions of Section 13a(1) of the Transportation Act of 1958, discontinued two interstate passenger trains which en route stopped at certain points in Pennsylvania. The Public Utility Commission of Pennsylvania ("the PUC") in an order dated July 9, 1962, required the Railroad to continue within the state the service previously provided by the two trains, basing its order solely on the ground that Section 13a(1) was unconstitutional as applied to the intrastate segment of the service. The Railroad brought suit in the United States District Court for the Middle District of Pennsylvania to enjoin enforcement of the PUC order and that court granted the relief requested.

Petitioners now seek review of the decision of the Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court.

The following summary describes the history and circumstances of the controversy.

Prior to February 1962, the Railroad operated two passenger trains, numbers 638 and 645, over its line between Harrisburg, Pennsylvania, and Hagerstown, Maryland. The trains served primarily as a link in through service between New York and Roanoke, Virginia, via Harrisburg, the service south of Hagerstown, Maryland being provided by carriers other than the Railroad. The trains, which operated during the middle of the night, stopped en route at three small towns in Pennsylvania. Of the approximately 20 passengers that on the average used the train each day, only one or two travelled between points in Pennsylvania.

In November 1960, the Railroad filed with the PUC an application for leave to discontinue trains 638 and 645 in Pennsylvania. In support of the application the Railroad offered proof that it proposed to provide service for the majority of the passengers by rerouting a through sleeping car via Washington, that alternative methods of transportation were available for the small number of local passengers, and that the discontinuance of the two trains would result in substantial savings to the Railroad.

The PUC denied this application on August 7, 1961. The Railroad did not seek judicial review of the denial in the state courts.

On January 25, 1962, the Railroad, acting pursuant to the provisions of Section 13a(1) of the Transporta-

tion Act of 1958, filed with the Interstate Commerce Commission notice of its intention to discontinue the operation of trains 638 and 645 on February 25, 1962. In accordance with the requirements of the statute the notice was filed 30 days in advance of the date that the proposed discontinuance would become effective. Notice of the proposed discontinuance was given to the public and to the PUC in the manner required by the statute. The Railroad also furnished the Interstate Commerce Commission and PUC information as to the patronage of the trains, alternative services, revenues, expenses and other information as required by the applicable Interstate Commerce Commission regulations.

Under the provisions of Section 13a(1) the Interstate Commerce Commission was authorized, in its discretion, at any time within the 30 day notice period to enter upon an investigation of the proposed discontinuance. The Commission was authorized, if it instituted an investigation, to suspend the proposed discontinuance, for a period not to exceed 4 months, by serving an order upon the Railroad at least 10 days prior to the date on which the discontinuance would otherwise have become effective. If the Commission instituted an investigation it was authorized to require the continuance or restoration of service if it found, after hearing, that the service was required by the public convenience and necessity and would not unduly burden interstate or foreign commerce.

On February 8, 1962, the PUC sent to the Interstate Commerce Commission a formal protest against the proposed discontinuance. The Commission, however, elected not to exercise its authority to institute an investigation or to suspend the proposed discontinu-

ance.[1] Consequently under the terms of the statute the Railroad was entitled to discontinue the two trains on February 25, 1962, and it did so.

On February 20, 1962, the PUC issued a rule requiring the Railroad to show cause why it should not maintain within the state the service provided by the two trains as required by the PUC order of August 7, 1961. On February 27, 1962, the Railroad responded by contending that the trains had been discontinued in strict compliance with the provisions of Section 13a(1) of the Transportation Act of 1958 and that as a result the PUC no longer had authority to require the continuance of the service provided by the trains. In an order dated July 9, 1962, the PUC rejected this contention on the ground that Section 13a(1) as so applied was unconstitutional and again directed the Railroad to continue the service provided by the two trains within the state of Pennsylvania. The Railroad

[1] The Court of Appeals referred to the fact that the Commission issued its decision not to institute an investigation on February 8, 1962, the same day that the PUC sent its protest to the Commission and before the expiration of the time fixed in the Railroad's notice for the filing of objections. The Court characterized this procedure as "most inappropriate" but added that the PUC did not argue that this action of the Commission vitiated the decision "possibly because the ICC still had time to change its decision had it so desired after the petition to intervene was received." (Petition, p. 32, n. 3.) The fact is that in its opinion dated July 9, 1962, the PUC explicitly made this concession (Petition, Appendix VI, p. 96):

> "While we take exception to the premature decision of the Interstate Commerce Commission in these circumstances, we shall assume that it did consider our protest as well as the others, and that had it seen fit to rescind its order it would have done so between February 11 and February 15, 1962, during which period it did have the authority to order a suspension."

did not seek judicial review of this order in the state courts.

On August 9, 1962, the Railroad sued in the United States District Court for the Middle District of Pennsylvania to enjoin the members of the PUC from enforcing its order of July 9, 1962. The PUC defended primarily on the ground that Section 13a(1), as applied, was unconstitutional but also argued that its order of July 9, 1962, was *res judicata* and entitled to full faith and credit or, in the alternative, that the District Court should decline jurisdiction for reasons of comity. A three-judge court having been convened pursuant to the provisions of 28 U.S.C. § 2281, that court on August 5, 1965, entered a judgment granting the injunctive relief prayed for.

The PUC appealed to this Court. On December 13, 1965, the Court in a *per curiam* decision remanded the case to the District Court on the ground that under *Swift & Co.* v. *Wickham,* 382 U.S. 111, the case should have been heard by an ordinary district court with appeal to the Circuit Court of Appeals. *Utility Commission* v. *Pennsylvania R. R.,* 382 U.S. 281.

On February 9, 1966, the District Court, a single judge presiding, adopted and re-affirmed its prior opinion and again enjoined the members of the PUC from enforcing the order of July 9, 1962. The judgment of the District Court was affirmed by the Circuit Court of Appeals on December 6, 1966.

REASONS FOR DENYING THE PETITION

This case presents no questions that warrant review by this Court. The constitutional and other contentions advanced by petitioners are without substance and the decision of the court below rejecting those

contentions is in accord with the applicable decisions of this Court and not in conflict with any decision by any other court of appeals. The particular situation in controversy is no longer of practical consequence; the trains in issue have been discontinued for five years and petitioners do not suggest that on the facts as they exist today public interest or convenience would require or justify the reinstatement of the trains.

I. There Is No Substance in Petitioners' Constitutional Arguments.

Section 13a(1) of the Transportation Act of 1958 authorizes a carrier, subject to certain procedural requirements, to discontinue any interstate train, on "its own initiative and without any prior authorization, either by Congress or by the Commission", subject to the authority of the Interstate Commerce Commission to investigate and to defer the discontinuance for not longer than four months if in the exercise of its discretion it decides to do so. *State of New Jersey* v. *United States,* 168 F. Supp. 324, 333 (D.N.J. 1958) *aff'd* 359 U.S. 27. If the Commission conducts an investigation, it may, after a hearing and upon a finding that the operation of a train is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, require the continuance of the train for a period not to exceed one year.[2]

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[2] Section 13a(2) of the Act provides for a different procedure in the case of intrastate trains. Such trains may be discontinued only after a hearing before the Commission and upon the basis of certain specified findings by the Commission, including a finding that continued operation of the train will constitute an unjust and undue burden upon the interstate operations of the carrier.

Petitioners' attack on the constitutionality of Section 13a(1) as applied here is based essentially on a single ground. They concede that Congress has the constitutional power to authorize discontinuance of the service provided by an interstate train but they contend that this power cannot be exercised with respect to the intrastate segment of service provided by such a train except after hearing and upon the basis of a finding that the service is a burden on interstate commerce (Petition, pp. 12-21). Petitioners do not explain whether they contend that this alleged limitation upon the commerce power is inherent in the commerce clause itself or whether they contend that it is imposed upon the exercise of the commerce power by the due process clause of the Fifth Amendment. On either view, there is no merit in their contention.

In Section 13a(1) Congress has exercised its constitutional power to regulate trains that are directly engaged in interstate commerce. Long ago this Court held that the power to regulate such trains is paramount and extends to both the intrastate and the interstate segment of the service that they provide. *Colorado* v. *United States,* 271 U.S. 153, 165-166. And the same decision shows that there is no unexpressed but implied limitation in the commerce clause that requires a hearing and a finding of burden on interstate commerce as a condition precedent to the application of this regulatory power to the intrastate segment of service provided by an interstate train. In the *Colorado* case the Interstate Commerce Commission, acting pursuant to Section 1, paragraphs 18-20, of the Interstate Commerce Act, had issued a certificate permitting the interstate carrier involved to abandon, both as to intrastate and interstate traffic, a branch line lying

wholly within the state. Colorado attacked the Commission's order on the ground that it was not supported by essential findings and in that connection emphasized the absence of any finding that continuation of the intrastate aspect of the operation would result in discrimination against interstate commerce. This Court rejected that contention, holding that the sole test prescribed by the statute was that the abandonment be consistent with public necessity and convenience (271 U.S. at p. 168). The opinion makes it plain that the findings were a statutory and not a constitutional requirement.[3]

The operation of interstate trains is itself interstate commerce and the activity does not lose its essential interstate character merely because the trains also provide some local service. Congress has plenary power under the commerce clause to regulate the activity because it is interstate commerce and not merely, as is true of some local activities, because it burdens or affects interstate commerce.[4] It follows

[3] The Court said (271 U.S. at pp. 167-168):

"While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use of intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate."

[4] As the Court of Appeals observed, the power of Congress to regulate interstate railroad operations by authorizing the discontinuance of trains would be frustrated if every state through which an interstate train passes could require the railroad to maintain or restore service on the segment of the line within its borders. (Petition, p. 38.)

that the power of Congress to authorize the discontinuance of interstate trains, and thereby the discontinuance of any intrastate segment of the service that they may provide, does not require or depend upon an antecedent finding that the operation of those trains or the intrastate segment of their service affects or burdens interstate commerce.

Indeed, even in the case of activities that are subject to federal power only because they burden or affect interstate commerce, this Court has held that once Congress has determined, on a rational basis, to regulate those activities the Constitution does not require either Congresional or administrative findings of a burden or effect on interstate commerce on a case-by-case basis in respect to each specific instance in which the statute is applied. *Katzenbach* v. *McClung,* 379 U.S. 294, 302-303; *United States* v. *Darby,* 312 U.S. 100, 120-131.

The analogies that petitioners attempt to draw from decisions relating to the application of federal statutes to activities that are essentially local in character are inapposite. Whatever limitations modern constitutional doctrine may impose upon the application of federal regulatory power to such local activities those limitations do not apply when Congress regulates instrumentalities or activities that are directly engaged in or are a part of interstate commerce. Not one of the decisions cited by petitioners suggests that the Constitution prevents Congress from authorizing the discontinuance of interstate trains that also provide local service except upon the basis of a hearing

and a finding that the local service burdens or affects interstate commerce.[5]

There is likewise no merit in petitioners' constitutional argument if it is viewed as resting upon the Fifth Amendment rather than upon the commerce clause itself. They have cited no decision that provides the slightest support for any suggestion that discontinuance of trains 638 and 645 pursuant to the provisions of Section 13a(1) infringed any rights of the PUC, the Commonwealth of Pennsylvania, or the citizens of Pennsylvania that are entitled to protection under the Fifth Amendment.

Any argument that Section 13a(1) violates the due process clause because it does not provide for a hearing before the Interstate Commerce Commission prior to discontinuance of service is precluded by the decision of this Court in *State of New Jersey* v. *United States,* 168 F. Supp. 324, 330-334, *affirmed,* 359 U.S. 27. Precisely that argument was made in that case by

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[5] Petitioners' reliance upon Texas v. Eastern Texas R.R., 258 U.S. 204, is misplaced. There the lines of the railroad involved lay entirely within the state of Texas and it was "being operated independently, and not as a branch of any railroad engaged in interstate commerce." Colorado v. United States, 271 U.S. at p. 169. Some interstate traffic moved over the intrastate lines and the Court held that Congress could constitutionally authorize abandonment of this interstate traffic. Once the railroad had been authorized to abandon the carriage of interstate traffic the remaining intrastate operations were not related in any way to interstate transportation. In Colorado v. United States, 271 U.S. at pp. 169-170, the case was distinguished on this ground. To the extent that any constitutional doubts raised by the Texas case have any vitality under the modern decisions they can only relate to the power of Congress to authorize abandonment of intrastate operations by a railroad which carries no interstate traffic and conducts no interstate transportation operations of any kind. No issue of that kind is presented here.

New Jersey and rejected. Petitioners have attempted to distinguish that decision on the ground that there no intrastate service was involved. Whatever relevance the difference might be thought to have in relation to the commerce clause it is of no significance under the Fifth Amendment. In relation to the power of Congress to regulate commerce the requirement of procedural due process imposed by the Fifth Amendment does not vary depending upon whether that power is exercised with respect to an interstate service, as it was in New Jersey, or with respect to the intrastate segment of interstate service, as it has been here. Since denial of a full hearing before the Interstate Commerce Commission did not violate the due process clause in the New Jersey case it cannot violate the due process clause in the instant case. Petitioners have shown no reason why this Court should depart from or overrule its prior decision.

II. There Is No Substance in Petitioners' Contentions on Full Faith and Credit and Comity.

Petitioners' argument on full faith and credit and comity are inconsistent with the provisions and the purpose of Section 13a(1). The terms of the section make it plain that Congress has preempted the regulatory field here involved and has deprived state agencies of the authority to act upon the subject matter of this litigation. The section provides that a notice of discontinuance of service may be filed by any carrier if its rights with respect to the discontinuance of service "are subject to any provisions of the constitution or statutes of any State of any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency

of any State". It further provides that any carrier filing a notice may discontinue service pursuant to the notice, except as otherwise ordered by the Interstate Commerce Commission, the "laws or constitution of any State or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding."[6]

The doctrine of full faith and credit does not apply in a federal court to a state decision if the subject matter of the litigation has been preempted by federal legislation. See *Durfee* v. *Duke*, 375 U.S. 106, 114, *Kalb* v. *Feuerstein*, 308 U.S. 433, 439-440. And see also *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514.[7] To treat the decision of the PUC on the constitutionality of Section 13a(1) as entitled to full faith and credit would frustrate the provisions of the

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[6] The effect of Section 13a(1) on state authority is made plain by the last two sentences of the section. They set forth certain conditions, not here applicable, in which it is provided that the statute "shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory agency of any State" and that the jurisdiction of the state "shall no longer be superseded." Since the specified conditions do not exist in the present case the effect of the section here is to supersede state authority.

[7] Petitioners' attempt to distinguish these cases on the ground that the PUC had "jurisdiction over the subject matter" is simply a denial that Section 13a(1), even if constitutionally valid, supersedes state authority. In this connection it should be observed that in its opinion of July 9, 1962, the PUC itself said (Petition, p. 101):

> "* * * we are impelled to the conclusion that Section 13a(1) of the Federal Transportation Act of 1958 does intend a supersession of all state law even as to the intrastate aspects of any given interstate train."

statute and nullify the public policy declared in those provisions.[8]

Petitioners stand in no better position when they invoke the doctrine of comity. The legislative history of Section 13a(1), as well as its language, makes it clear that one of its purposes was to avoid delays in the discontinuance of burdensome passenger service which ensued when carriers were required to exhaust their remedies in the state courts.[9] To apply the doctrine of comity here would be inconsistent with this Congressional intent, disregard an explicit Congressional direction, and disrupt the regulatory scheme.

Alabama Public Service Commission v. *Southern Railway Co.*, 341 U.S. 341, on which petitioners primarily rely to support their comity argument is inapposite. That case was decided before the enactment of Section 13a(1) and has no application to the present

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[8] It is to be noted that in Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, the Court did not base its decision on the full faith and credit clause but rather held that the District Court should have declined jurisdiction "as a matter of sound equitable discretion" (*id.* at p. 350). There is no intimation in the opinion that if the Court had decided, in the exercise of its equitable discretion, to accept jurisdiction, it would have regarded itself as bound by the decision of the Alabama Public Service Commission.

[9] See H.R. No. 1922, 85th Congress, 2d Session, pp. 11-12; S.R. No. 1647, 85th Congress, 2d Session, pp. 21-22; and Report No. 2274 (Conference Report), 85th Congress, 2d Session, pp. 13-14. See also State of New Jersey v. United States, 168 F. Supp. 324, 336 (D. N.J. 1959), *affirmed*, 359 U.S. 27, and Southern Railway Co. v. North Carolina, 376 U.S. 93, 101.

situation in which the regulatory field has been preempted by Congressional action.[10]

In *Alabama* this Court described the controversy as one in which a federal court had been asked to intervene in resolving "an essentially local problem" that turned upon "predominately local factors" (341 U.S. at pp. 347, 349).[11] In contrast the sole issue in this case is the constitutionality of Section 13a(1) of the Interstate Commerce Act as applied to interstate trains. This case does not turn on disputed issues of fact, on local law, or on any of the other considerations that have led this Court in the past to decline jurisdiction for reasons of comity.

In *California Commission* v. *United States,* 355 U.S. 534, 539, this Court declined to apply the doctrine of comity in a case that involved the constitutionality of a state statute which would have deprived the federal government of the right conferred upon it by Section 22 of the Interstate Commerce Act to negotiate special rates for the shipment of Government property. This Court said (355 U.S. at p. 539):

> "That issue is a constitutional one that the Commission can hardly be expected to entertain."

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[10] In that case the Court noted that there was no federal regulatory statute that impaired "the primary authority" of the state to deal with the discontinuance of passenger service there involved (341 U.S. 341, 345-346). Here Congress has enacted a statute for the explicit purpose of permitting the discontinuance of service provided by interstate trains without resort to state authority.

[11] This Court pointed out that the posture of the case made it impossible to consider "any impact the order of Alabama Public Service Commission might have on interstate commerce." (341 U.S. at pp. 346-347, n. 9.)

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

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APPENDIX

DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

SEC. 13a. [*August 12, 1958.*] [*49 U.S.C. § 13a.*] (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have the authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months

beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.